IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No.———

MABEL C. HERMAN,
dba Herman Oil Company,
PETITIONER,

vs.

TRAVELERS MUTUAL CASUALTY COMPANY,
a Corporation,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion in the Circuit Court of Appeals is reported in 116 Fed. 2d. 152. A copy thereof also appears in the Record. (R. 147-154)

II.

STATEMENT OF THE CASE.

A full statement of the case has been given under subhead "A" in the petition for the writ and in the cause of brevity, such statement is not repeated at this point.

III.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in taking jurisdiction for the reason that the appeal was not from a final order or judgment.

2. The Circuit Court erred in its interpretation of Section 66-1,128, G. S. of Kan. 1935, page 1577; and its decision upon the proper interpretation of that statute is in conflict with the decision of the Supreme Court of Kansas in Dunn, et al. vs. Jones, et al., 143 Kan. 218, 53 Pac. 2d. 918, and the Rules of the Kansas Corporation Commission.

IV.

SUMMARY OF THE ARGUMENT.

Point A.

THE DECISION OF THE COURT UPON THE QUESTIONS OF JURISDICTION IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, IN CARTER, ET AL. VS. POWELL, ET AL., 104 F. (2d) 428; REHEARING DENIED, 104 F. (2d) 1012; CERTIORARI DENIED, 308 U. S. 611, AND CALLS FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Point B.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS UPON AN IMPORTANT QUESTION OF LOCAL KANSAS LAW AND IS CONTRARY TO AND IN CONFLICT WITH APPLICABLE LOCAL DECISIONS AND ADMINISTRATIVE RULINGS.

ARGUMENT.

Point A.

THE DECISION OF THE COURT UPON THE QUESTIONS OF JURISDICTION IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, IN CARTER, ET AL., V. POWELL, ET AL., 104 F. (2d) 428; REHEARING DENIED, 104 F. (2d) 1012; CERTIORARI DENIED, 308 U. S. 611, AND CALLS FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The notice of appeal (R. 44), is from "The Court's order directing a verdict in favor of defendant entered in this action on 9th day April, 1940, and from the verdict so directed on said day." (R. 44)

Rule 73 (b) of the Rules of Civil Procedure, provides that the notice of appeal "Shall designate the judgment or part thereof appealed from." The appeal in this case was not taken from the judgment of the court but was taken from the order directing a verdict in favor of defendant and from the verdict itself. Neither are final orders or decisions from which appeals will lie, under Section 225, title 28, U. S. C. A.

Rule 73 (b) of the Federal Rules of Civil Procedure.

Section 225, Title 28, U. S. C. A., Judicial Code, Sec. 128, as amended.

Burns v. Ender Coal & Coke Co., (C. C. A. Ind. 939), 104 F. (2d) 964.

Kingman & Co. v. Western Manufacturing Co., 170 U. S. 675, 42 L. ed. 1192.

Bostwick v. Brinkerhoff, 106 U. S. 3.

Hughes Federal Practice, Vol. 5, Sec. 2913, page 135.

Moss v. Kansas City Life Insurance Co., 96 F. (2d) 108, 111.

Heike v. U. S, 217 U. S. 423, 430, 30 S. Ct. 539, 541, 54 L. ed. 821.

Darling Lumber Co. v. Porter, 256 F. 455.

Skaggs v. Callabresi, 145 Kan. 739, 67 P. (2d) 566.

Raytheon Mfg. Co. v. Radio Corporation of America, (C. C. A. Mass. 1935), 76 F. (2d) 943, affirmed 296 U. S. 459, 56 S. Ct. 297, 80 L. ed. 327.

In Carter v. Powell, 104 F. (2d) 428, the Circuit Court of Appeals, Fifth Circuit held:

> "Where notice of appeal designated only that portion of the order or judgment denying motion to dismiss on ground that the court did not have jurisdiction to entertain the suit, the regularity of the process and the merits of the matter were not brought before the Circuit Court of Appeals for review. Rules of Civil Procedure for District Courts, rule 73 (b), 28 U. S. C. A. following section 723c."

The only error set out in the statement of points upon which the plaintiff stated it intended to rely on the appeal is the alleged error of the trial court in directing the jury to return a verdict in favor of the defendant. (R. 48)

In Hughes Federal Practice—Jurisdiction and Procedure, Vol. 19, Sec. 27040, it is said:

> "A Notice of appeal is not rendered ineffective as to appealable matters mentioned therein, because it also refers to nonappealable judgments, for the language which deals with that which is nonappealable may be rejected as surplusage."

Striking the nonappealable matters from the notice of appeal in this case would leave nothing for the appellate court to exercise its appellate jurisdiction upon.

No effort was made upon the part of the respondent to amend its notice of appeal after the matter was called to its attention.

We recognize that the Rules of Civil Procedure have as one object the simplification of procedure, but do not understand that they do or are intended to render appealable orders which are not final decisions and which were not formerly appealable.

It is therefore respectfully submitted that the Circuit Court was without jurisdiction of the subject matter of the action.

ARGUMENT.

Point B.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS UPON AN IMPORTANT QUESTION OF LOCAL KANSAS LAW AND IS CONTRARY TO AND IN CONFLICT WITH APPLICABLE LOCAL DECISIONS AND ADMINISTRATIVE RULINGS.

The case was tried, the District Court found, and it was agreed in the Circuit Court of Appeals, that the laws of Kansas controlled the disposition of the case, and the Circuit Court so considered it. (Travelers Mutual Casualty Company v. Herman, 116 Fed. 2d. 151.)

The principal question of law presented and decided upon its merits involves the proper interpretation of Sec-

tion 66-1,128, G. S. of Kan. 1935, page 1577, which provides:

> "No certificate or license shall be issued by the public service commission to any 'public motor carrier of property', 'public motor carrier of passengers', 'contract motor carrier of property or passengers', or 'private motor carrier of property', until and after such applicant shall have filed with, and the same has been approved by, the public service commission, a liability insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state."

The respondent furnished petitioner a policy of insurance to which was attached, by endorsement, a complete coverage clause, as required by the above statute and in the form prescribed by the rules of the Kansas Corporation Commission, the administrative agency charged with the endorsement of the Kansas Motor Carrier Act of which Section 66-1,128, supra, is a part. (R. 27)

In addition, the respondent attached to the policy by endorsement, a so-called reimbursement clause. (R. 21) This clause was not required by the statute or rules of the Commission, neither is it in the form of reimburse-

ment clauses which have been made permissive by the rules of the Kansas Corporation Commission. The contention of the petitioner is that the reimbursement clause is invalid, being in violation of the provisions of Section 66-1,128, supra, and contrary to the interpretation of that statute by the Supreme Court of Kansas and the Kansas Corporation Commission.

Proper consideration of the local law requires a brief statement of the history of the legislation. What is now Section 66-1,128, G. S. of Kan. 1935, was enacted by the legislature in 1931 and first appeared as Chapter 236, Section 221, Laws of Kansas, 1931.

Prior to 1931, the law in regard to insurance upon motor vehicles operated by carriers of property for hire in Kansas, was embodied in Section 7 of Chapter 206 of the Laws of Kansas 1925, which was as follows:

> "No certificate of convenience shall be issued by the public utilities commission to any motor carrier until and after such motor carrier shall have filed with, and the same has been approved by, the public utilities commission of this state, a liability insurance *bond* in some insurance company, or association authorized to transact business in this state, in such a sum as the public utilities commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to make compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such motor carrier. Said public utilities commission shall also require a satisfactory bond in such penal sum and conditioned on the payment of all fees, taxes or charges which may be due the state

of (or) any governmental unit in the state under any permit of operation and for the faithful carrying out of any permit granted by said public utilities commission;

PROVIDED, that any motor carrier coming under the provisions of this act who shall furnish annually to the public utilities commission satisfactory proof and evidence of such motor carrier's financial ability to properly protect the interest of the public and pay compensation for injuries to persons and loss or damage to property on account of or arising out of negligent operation of such motor carrier's business, shall not be required to furnish any liability insurance *bond* therefor. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state." (Italics ours)

Under the law of 1925, the motor carrier was permitted to file a *bond*, or to be a self insurer by showing proper qualification, and it was also sufficient, under the law as it then existed, for the motor carrier to file a policy of insurance which would indemnify the motor carrier against claims for damages suffered as a consequence of the motor carrier's negligent operation.

The legislature, in enacting Section 21, of Chapter 236, of the Laws of Kansas, 1931, did not specifically repeal Section 7 of Chapter 206, of the Laws of Kansas of 1925. For several years, considerable confusion existed as to whether both sections were in effect, or whether the earlier statute had been repealed by revision and implication. This matter was set at rest by the Supreme Court

of Kansas in Dunn, et al. v. Jones, et al., 143 Kan. 218, 53 Pac. 2d. 918, when it was held:

> "Section 7 of Chapter 206, of the Laws of 1925, appearing as R. S. 1933 Supp. 66-1,102, relating to insurance to be furnished by a motor carrier, was repealed by revision of the entire act in which it appeared and by revision and amendment of the section itself by section 21 of chapter 236 of the Laws of 1931.

A comparison of the two statutes reveals this significant and far reaching change. As heretofore stated, the old statute permitted a bond, self insurance, or a policy of indemnity insurance. On the other hand, the 1931 statute, which governs the case at bar requires and permits only, "a liability insurance policy".

It is not contended that the Supreme Court of Kansas has squarely passed upon the question here presented, but, in Dunn, et al. v. Jones, et al., supra, the new statute was under consideration in a case where for the first time a third person damaged by the negligent operation of a motor carrier, brought suit directly against the insurance carrier to recover damages. This was a radical departure from the former Kansas practice under the old statute, which permitted the filing of a bond or contract of indemnity insurance by the carrier, which required the injured third person to first recover judgment against the motor carrier before he had recourse against the insurance carrier. The Kansas Supreme Court in that case pointed out the revolutionary character of change

brought about by the repeal of the old statute and the enactment of the new, and held:

> "Section 21 of chapter 236 of the Laws of 1931 (R. S. 1933 Supp. 66-1,128) requires, as a condition to issuance by the public service commission of a certificate or license to a motor carrier, the filing of an insurance policy indemnifying against the condition of being liable, as distinguished from a policy which indemnifies against ultimate established loss, resulting from final enforcement of liability.
>
> (1) "The obligation of such a policy to pay compensation for injury to person and loss of or damage to property, resulting from negligent operation of the motor carrier, rests on the insurer from the time of accident resulting in injury.
>
> "The obligation may be enforced by action brought directly against the insurer by the person sustaining injury.
>
> "To secure benefit of the motor-vehicle-transportation act, a motor carrier filed with the public service commission a policy indemnifying against loss, and not against liability, certain provisions of which were prescribed by the public service commission. The policy was approved by the public service commission, and the motor carrier obtained benefit of the act. *Held,* notwithstanding the policy was in form and verbal content a policy indemnifying against loss, the obligation of the insurer was that prescribed by statute, the terms of which are to be read into the policy."

The Circuit Court of Appeals in its opinion, states:

> "The agreement here in dispute was a part of the policy when it was filed with the Commission and was accepted by the Commission as complying with the laws of the State."

In Dunn, et al. v. Jones, et al., supra, the policy was also filed with the commission and accepted by the commission, but the Supreme Court of Kansas held that notwithstanding this fact, and notwithstanding the fact that the policy in that case was in form and in verbal content a policy indemnifying against loss, which did not comply with the statute, still the obligation of the insurer was that prescribed by statute, the terms of which are to be read into the policy. In this respect, the opinion of the Circuit Court of Appeals is in direct conflict with the decision of the Supreme Court of Kansas.

It is the contention of the petitioner that the decision of the Circuit Court of Appeals is in conflict with the decision in Dunn, et al. v. Jones, et al., supra, for the reason that the policy of insurance sued upon in this case, if the reimbursement clause is to be construed as a valid part of it, is nothing more than a bond whereby the insurer is obligated to pay in the first instance, but is given the right, in turn, to recover from its insured; that such a policy is not a policy of liability insurance which insures against the condition of being liable. This would have been entirely proper under the statute as it existed prior to 1931, but not under the statute which governs this case.

Aside from being in conflict with the decision in Dunn, et al. v. Jones, et al., supra, the decision of the Circuit Court of Appeals is in conflict with the rules and regulations of the Kansas Corporation Commission, the administrative agency charged with the enforcement of the statute. (Section 66-1,123, G. S. of Kan. 1935)

Section 66-115, G. S. of Kan. 1935, being a part of the statute defining the powers of the Corporation Commission, provides:

> "All orders, regulations, practices, services, rates, fares, charges, classifications, tolls, and joint rates fixed by the Commission shall be in force and effect on and after thirty days from the making thereof and expiration of thirty days after service aforesaid, shall be prima facie reasonable unless, or until, changed or modified by the commission or in pursuance of proceedings instituted in court as provided by this act."

In Stratton v. A. T. & S. F. Ry. Co., 118 Kan. 673, 679, 236 Pac. 831, the Court, in its opinion said:

> "The lawful orders of the Public Utilities Commission have the force of statutes. In effect, they are administrative details of the statutes, prepared and promulgated under statutory authority. (State v. Ry. Co., 76 Kan. 467, 92 Pac. 606) See also, R. S. 66-115, 116, 138, 139, 140, and the citations in the State v. Crawford, 104 Kan. 141, 143, 177 Pac. 360."

The Kansas Corporation Commission is the successor to the Public Utilities Commission and exercises its powers.

> "That all of the powers, duties, authority and jurisdiction heretofore vested in the public service commission under and by virtue of sections 55-601 to 55-609, 1931 supplement to the Revised Statutes of Kansas, 1923, and chapter 214 of the Session Laws of 1933, be and are hereby vested in the state corporation commission." (Gen. St. of Kan. 1935, Sec. 74-601c.)

By virtue of the statutory authority above quoted, the Kansas Corporation Commission has, since 1925, promulgated rules, regulations and orders governing the operation of private contract carriers, and public carriers of persons and property, in the State of Kansas. The rules and regulations, as first promulgated, made no provision for a reimbursement endorsement upon policies of public liability and property damage insurance filed to comply with the act. (R. 127, 128) In 1926, a reimbursement endorsement first found its way into the rules and regulations of the Commission in the following form:

> "It is further understood and agreed if the company pays any loss under this policy, which has resulted directly or indirectly from the violation of the provisions of the policy by the assured, the assured agrees to reimburse the company to the extent of such loss." (R. 129)

The same reimbursement endorsement again appeared in the rules and regulations of the Corporation Commission as amended February 4, 1935, under Docket No. 15600. (R. 130-131)

This is the only reimbursement clause authorized by the Kansas Corporation Commission prior to the time of the alleged cause of action in this case. There is no allegation in the complaint that the assured in this case has violated the terms of her policy and, therefore, such a reimbursement clause would not reach the situation that we have here.

However, it is significant that after the passage of the act of 1931, and the decision in Dunn v. Jones, et al.,

supra, the Kansas Corporation Commission revised its rules, regulations and orders, effective March 15, 1937, and provided for the statutory endorsement concerning the waiver of description of vehicles, such as is attached to the policy in this case, *but eliminated entirely the reimbursement endorsement.* (Tr. 132, 133) The rules and regulations effective March 15, 1937, continued in effect until August 7, 1939, and were in effect at the time the cause of action in this case, if any, arose.

Effective August 7, 1939, after notice and hearing, the rules and regulations of the Kansas Corporation Commission were again amended by an order of said date amending Rule 24, under Docket No. 15,600, and the following reimbursement clause was authorized:

> "Nothing contained in this policy or any endorsement thereon, nor the violation of any of the provisions thereof by the assured, shall relieve the company from liability thereunder as an insurer; provided, that nothing herein shall be construed to prohibit the company from providing for the right of reimbursement or subrogation as between itself and the assured in cases where the carrier is operating equipment in violation of the permit, license or certificate issued to him by the Commission." (R. 135)

It therefore seems apparent that the construction placed upon the laws of Kansas, governing the operation of motor carriers by the Kansas Supreme Court, and by the Kansas Corporation Commission in its administrative capacity, do not contemplate, permit, nor approve a reimbursement clause such as that relied upon by the

appellant in this case, and that the clause is therefore void, and of no force and effect.

The Circuit Court of Appeals, however, relied upon the fact that there was no rule of the Corporation Commission permitting any kind of a reimbursement endorsement at the time this cause of action accrued. We deem it significant that there was no such endorsement permitted—and it was only permissive, it was not required—at this particular time in the light of the decision in Dunn, et al. v. Jones, et al., supra. We also deem it significant that never has the Corporation Commission, in its administration of the act, either permitted or required a reimbursement endorsement, which would reach and cover this case.

The Circuit Court of Appeals based its decision in part upon the theory that the statute was enacted to protect the interests of the public. That it was enacted to protect the public may be admitted, but it does not necessarily follow that that is its only purpose. Beyond this, the legislature chose the method, which in its judgment was best adapted to accomplish its purpose and if our theory of the interpretation placed upon the statute by the decisions of the Supreme Court of the State of Kansas, and the Kansas Corporation Commission, is correct, the legislature chose a method which not only protects the public, but also protects the motor carrier as well. The method by which its purpose is to be accomplished is a matter which lies solely in the judgment of

the legislature. Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404; Arizona Copper Co. v. Hammer, 250 U. S. 400; State v. Gateway Mortuaries, 87 Mont. 225, 287 Pac. 156; State, ex rel. v. Levitan, 190 Wis. 646, 210 N. W. 111; School District v. Olsness, 53 N. D. 683, 208 N. W. 968.

Construction of state statutes by administrative agencies of the state, charged with the enforcement and administration of the statute, have at least persuasive force and are also to be considered by the Federal Courts. Keifer & Keifer v. Reconstruction Finance Corp., 97 F. (2d) 812, 814; Driscoll v. Edison Light & Power Co., 307 U. S. 104, 114, 83 L. ed. 1134; Fox v. Standard Oil Co. 294 U. S. 87, 96, 97, 79 L. ed. 780, 787.

State statutes have always been controlling in Federal Courts, on questions of state law, more recently the decisions of state courts of last resort, and intermediate courts have been held controlling on such questions and the construction placed on states by administrative agencies are at least persuasive if not controlling in the absence of court decisions.

It is therefore submitted that the decision of the Circuit Court of Appeals on an important question of Kansas law affecting all engaged as carriers for hire of persons or goods by truck or bus in the State of Kansas is in conflict with applicable local decisions and administrative rulings; that this Court should take jurisdiction of

the case and that a writ of certiorari should issue as prayed for in the petition.

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